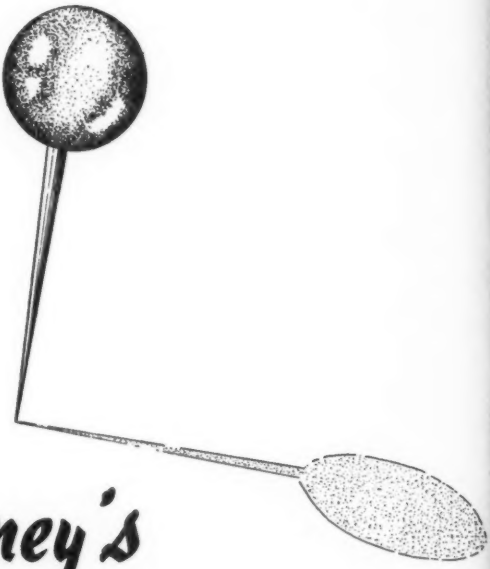
LOS ANGELES BAR BULLETIN

In This Issue

VOL. 29 JANUARY, 1954 No. 4



McKinney's PINPOINTS

EVERY POINT OF CALIFORNIA CASE LAW!

Only with McKINNEY'S CALIFORNIA DIGEST with its *truly California classification* can you quickly find EVERY point of California Case Law.

If you are not already one of the thousands of owners who are enjoying the time-saving, case-winning features of McKINNEY'S, write today for complete information and liberal terms. Why not do it NOW . . . while you are thinking about it?

BANCROFT-WHITNEY CO.

Lawbook Publishers Since 1856

McALLISTER & HYDE STREETS
SAN FRANCISCO 1, CALIF.

230 WEST FIRST STREET
LOS ANGELES 12, CALIF.

Los Angeles
BAR BULLETIN

Official Monthly Publication of The Los Angeles Bar Association, 241 East Fourth Street, Los Angeles 13, California. Entered as second class matter October 15, 1943, at the Postoffice at Los Angeles, California, under Act of March 3, 1879. Subscription Price $1.80 a Year; 15c a Copy.

VOL. 29 JANUARY, 1954 No. 4

President's Page

By W. I. Gilbert, Jr.
President, Los Angeles Bar Association

W. I. Gilbert, Jr.

Christmas has gone by again and with it another successful Los Angeles Bar Association Christmas party and Jinks. The Breakfast Club was, as usual, filled to capacity and everybody present had a fine dinner and a lot of fun. It is to be regretted that all who desired to attend could not do so. The Breakfast Club, under Fire Department regulations, has a given capacity which cannot legally be exceeded. The Board of Trustees has, on several occasions discussed the feasibility of having the Christmas party elsewhere in order to afford an opportunity for more members to attend. But to do so would require a substantial increase in the cost of each ticket. Thus far, the dilemma has been resolved in favor of the lower cost per ticket. The skits, as usual, were excellent and represented many hours of hard, diligent work on the part of the Jinks Committee (which includes the "stage hands") and the actors. They were fully entitled to the warm applause given to them by the audience, as well as the grateful thanks of the Association.

At last the new Law Library has been opened with the larger facilities so badly needed. This handsome structure will long stand as a monument to those who have worked so hard to convert the

dream into reality. The Library Trustees have had far from a simple task, and the entire community owes to them a great debt, which can be but inadequately paid with our gratitude.

Many of you probably noted in last month's issue an advertisement placed by the Oregon Supreme Court Library seeking certain back numbers of the Los Angeles Bar Bulletin. We are happy to report that a recent letter from the Oregon Supreme Court Librarian advises that Judge Yankwich, Chief Judge of our United States District Court, and Mr. Arthur G. Bowman, Associate Counsel of the Title Insurance & Trust Company, were able to furnish some of the requested back numbers. The Librarian advises, however, that the following issues are still urgently desired by the Oregon Supreme Court Library:

Volume 20, No. 1	September	1944
No. 2	October	1944
No. 7	March	1945
Volume 22, No. 12	August	1947

It is certainly a compliment to the excellent quality of our publication, as well as a gratifying indication of the importance and esteem in which it is held by the profession generally, to have back issues of the Los Angeles Bar Bulletin so earnestly sought by the Supreme Court Library of our neighboring state. We trust that members of the Association will consult their files of back issues and, if possible, supply the missing editions to the Oregon Supreme Court Library, Salem, Oregon.

REFERENDUM RESULT

Effective January 2, 1954, annual dues for active members of the Los Angeles Bar Association will be increased to $20, while dues of members of the Junior Committee and of the Women's Junior Committee will be increased to $10 for five years following year of admission and thereafter to $20 as a result of the recent referendum approving amendments to Section 8, Article II of the By-Laws. Of 1510 ballots received, 1498 were validly cast—with 846 in favor and 652 against the amendments.

"PAYMENT IN FULL"— OR IS IT?

By Ira M. Price, II*

"Ah, take the Cash and let the Credit go"—Omar Khayyám.

Ira M. Price, II

A smile brightens the face of Creditor as he surveys the morning mail. Here is the long-overdue letter from Debtor, who owes Creditor $1500.00 for goods delivered six months ago. "At last," Creditor beams, tearing open the envelope. But his smile vanishes as he examines Debtor's check. It calls for payment of only $1000.00 and bears the endorsement, "In full payment for all goods delivered to date." Creditor ponders the problem as he paces the floor.

Can he cash the check and hold Debtor for the balance? Shall he send back the check and demand the rest? Does it matter that Debtor promised last month to pay in full? Or whether the unpaid portion is really disputed? Creditor's next move is a wise one, all lawyers will agree. He calls you, his attorney, and asks your advice. What will you tell him?

The factual problem posed above is a common one. Our purpose here is briefly to try to answer, as far as possible, why and when the acceptance of partial payment (usually by cashing a check) will operate in California as a full satisfaction, although the creditor protests that a larger sum is due.

Theory and Elements of an Accord and Satisfaction

An obligation is extinguished by accord and satisfaction when a debtor gives and a creditor accepts "something different from or less than that to which the person agreeing to accept is entitled."[1] An accord, of course, is a contract; but is there any mutual assent when the creditor, before or while cashing a check given in "full payment," expressly denies the terms upon which the offer (accord) is made? Sometimes the courts have refused to find, under certain circumstances, an accord and satisfaction because there is "no meeting of the minds."[2] But generally the law has

*Associated with the Los Angeles law firm of Latham & Watkins; J.D. University of Michigan 1948; Vice Chairman, Junior Barristers.

[1]*Civil Code*, Sections 1521-1523.

[2]*Gibbons v. Brewster*, 82 CA (2d) 435, 186 P.(2d) 459 (1947); *Whepley Oil Co. v. Associated Oil Co.*, 6 CA (2d) 94, 44 P.(2d) 670 (1935).

had little difficulty in finding a valid accord and satisfaction despite the absence of any real mutual assent.

Sometimes it is said that by cashing the check a creditor is "estopped" to deny that a full settlement has been made;[3] or that the payee cannot "accept the benefits," by cashing a check, without consenting to the conditions endorsed on it.[4] Other decisions seem to equate an accord and satisfaction with an account stated.[5] The *Restatement* adopts the theory that the creditor's cashing of a check for a smaller sum than demanded would be "tortious" unless the debtor's terms are accepted, and the creditor cannot assert that he is a wrongdoer when his acceptance can be given some other legal effect.[6]

Whatever legal theory is used, all of the following elements must generally be present to fasten a settlement upon the creditor who receives a check but protests that a balance remains due him:

(1) The debt or claim must be disputed in good faith or be unliquidated.
(2) Payment must be accompanied with an explicit statement or declaration that the check is in full satisfaction.
(3) A mutual intention to settle up must be expressly or impliedly found in the circumstances.
(4) The creditor must cash the check or retain it for an unreasonable time.[7]

Necessity for Bona Fide Dispute

If there is no dispute at all concerning the amount due the creditor, his acceptance under protest of a smaller amount will not discharge the balance. Consideration to support an accord and satisfaction can be found only when there exists an honest dispute between the parties or the claim is unliquidated.[8]

---

[3]*Creighton v. Gregory*, 142 Cal. 34, 75 P.569 (1904); *Robertson v. Robertson*, 34 CA (2d) 113, 93 P.(2d) 175 (1939).

[4]*Potter v. Pacific Coast Lumber Co.*, 37 Cal. (2d) 592, 234 P.(2d) 16 (1951).

[5]*Wallace v. Crawford*, 21 CA (2d) 394, 69 P.(2d) 455 (1937); *Kinkle v. Fruit Growers Supply Co.*, 63 CA (2d) 102, 146 P.(2d) 8 (1944).

[6]*Restatement of Contracts*, Section 420.

[7]Usually these elements overlap to some extent. Consequently, many of the decisions cited herein are repeated under discussions of several of the named requirements.

Being a contract, an accord and satisfaction must have a lawful subject matter, competent parties, consideration, and consent. 1 *Cal.Jur.* (2d) 233. Since the first two elements ordinarily present no difficulty, they are not discussed here. Consideration is treated herein under the necessity of finding a bona fide dispute, and consent is discussed under the requirements of an intention to settle up and acceptance of payment.

[8]*Berger v. Lane*, 190 Cal. 443, 213 P.45 (1923); *Kelley v. David D. Bohannon Organization*, 119 A.C.A. 929 (Aug. 21, 1953), where the plaintiff, in accepting payment by check, said: "I am not accepting it in full. I am cashing it, but . . . I am coming back for the rest."

(Continued on page 115)

Once...

....is enough!

And once is enough to pay estate taxes! Through you, a Testamentary Trust can be set up for your client that may be used to avoid double taxation of the same estate. (Property taxed at the death of the first spouse, and taxed again at the death of the second spouse.)

A Testamentary Trust, using a corporate Trustee, can also secure experienced management for the estate—to protect the wife and children. Call our Estates Department, MAdison 6-2411.

Southern California's Oldest Trust Company

Title Insurance and Trust Company

433 South Spring Street, Los Angeles 13

Some Observations on Offers of Proof

By Clarence M. Hanson
Judge of the Superior Court

Clarence M. Hanson

A so-called "offer of proof" made in a trial court is a device used to test before an appellate court the correctness of a trial court's ruling excluding evidence. By and large it is a useless procedure, as is evidenced by the fact that scarcely a case is tried that does not contain an offer of proof, and yet in the century just past our appellate courts have discussed such assignments of error less than fifty times, and reversed only once on that and other grounds.[1] The procedure requires the withdrawal of the jury from the courtroom in innumerable instances or, in lieu thereof, an offer dictated to the reporter at the Bench out of the jury's hearing, thus seriously retarding the progress of the trial. However, as it is error for the trial court not to permit an offer of proof to be made, we proceed to explore the details of the rule.

Where an objection to a question on *direct examination* is sustained, it will not be reviewed on appeal if it is not self apparent that the question was proper and material and that the answer would have been beneficial, unless indeed the record contains a proper and adequate offer of proof showing the question was material and proper.[2] Even if that be shown, the case will not be reversed unless the record shows that the failure to procure the answer was prejudicial.[3] The rule which requires an offer of proof in certain instances is not applicable to questions asked on cross-examination[4] or where the witness is being examined under the

---

[1]The lone case is Liberty Bank v. Ernest, 93 Cal.App. 560. The 50 cases referred to do not include the cases where the court rules or intimates that no evidence of a certain type or class is admissible. Offers of proof need not be made in such cases. See Note 6 hereof.

[2]Marshall v. Hancock, 80 Cal. 82, 84 (conversation); Snowball v. Snowball, 164 Cal. 476 (conversation); MacDonnell v. California Lands, Inc., 15 Cal. 2d 344, 349; Hand v. Scodeletti, 128 Cal. 674; Stickel v. San Diego etc., 32 Cal. 2d 157, 162; Whitelaw v. Whitelaw, 122 Cal. App. 260; Grandy v. So. Pac. Co., 9 Cal. App. 2d 441; Price v. Price, 71 Cal. App. 2d 734, 738; Sumida v. Pac. Auto Ins. Co., 51 Cal. App. 2d 472, 478; Deeble v. Stearns, 82 Cal. App. 2d 296, 300 (conversations); Heinz v. Heinz, 73 Cal. App. 2d 61, 66; Travelers Fire Ins. Co. v. Brock & Co., 30 Cal. App. 2d 115; Wigmore on Evidence (3rd Ed.) Sec. 20, Note 6; 3 Cal. Jur. 2d Sec. 159, Note 4.

[3]Const. Art. 6, Sec. 4½; People v. O'Bryan, 165 Cal. 55.

[4]Tossman v. Newman, 37 Cal. 2d 522, 525.

provisions of C.C.P. 2055[5] or where the court has ruled broadly that no evidence is admissible in support of the theory or fact which the party is seeking to establish.[6]

The procedure in making an offer of proof is for the examiner to state the exact answer which will be given by the witness, or the tenor or substance of the answer. General offers of proof such as "I expect the witness to testify * * " or "I expect to prove" or made by way of conclusions rather than by evidential facts are ordinarily held not to be sufficiently specific. As stated in *Douillard v. Woodd,* 20 Cal. 2d 665, 670: "A mere general offer of proof without producing the witness or stating the evidence whereby the fact in issue is to be proved, or, if the witness be present, without putting a question to him in such form as to give opportunity for objection, is not correct trial procedure and it affords no ground for appeal."[7]

Ordinarily an offer of proof should state the purpose and object of the testimony sought to be introduced and all the facts necessary to establish its admissibility.[8] Not only must the answer as stated by the examiner be responsive to the question but plain and unequivocal as well.[9] If the offer includes in part evidence which is immaterial and irrelevant, or is otherwise improper or inadmissible, the ruling will not be reviewed.[10] Moreover, an appellate court will not consider a claim that the excluded evidence was admissible upon grounds not presented to the trial court.[11] The examiner is not entitled to use an offer of proof as a substitute for asking pertinent questions.[12] Errors in the rulings below will not be presumed.[13]

Most, if not all, practicing lawyers have often seen long and heated arguments as to the right to ask a question, followed by the laughter of all bystanders when the court allowed it, and the witness replied that he knew nothing about the matter. If, how-

---

[5]Lawless v. Calaway, 24 Cal. 2d 81, 91; Costa v. Regents, etc., 116 Cal. App. 2d 445.
[6]Lawless v. Calaway, 24 Cal. 2d 81, 92; Tomaier v. Tomaier, 23 Cal. 2d 754, 760; Caminetti v. Pac. Mut. L. Ins. Co., 23 Cal. 2d 94, 100; Costa v. Regents of Univ. of Calif., 116 Cal.App. 2d 445; 2 Cal. Jur. 2d Sec. 159, note 5.
[7]Biddick v. Kobler, 110 Cal. 191, 196; Stickel v. San Diego, etc., 32 Cal. 2d 157, 162; Rose v. Doe, 4 Cal. App. 680, 686.
[8]4 C.J.S. Sec. 291, Note 44.
[9]Westervelt v. National, etc., 69 N. E. 169 (Ind.); Houston v. Schrieber, 34 Ohio App. 244, 170 N.E. 661; Daniels v. Patterson, 3 N. Y. 47; Chamberlayne, Trial Evidence, sec. 365.
[10]Bostwick v. Mahoney, 73 Cal. 238; Stickel v. San Diego, etc., 32 Cal. 2d 157; Estate of Stark, 48 Cal. App. 2d 209, 213; Thompson on Trials, Sec. 678; Laflin v. Shackleford, 98 Fed. 372.
[11]Estate of Parkinson, 190 Cal. 475; Cheda v. Bodkin, 173 Cal. 7, 19.
[12]Estate of Stark, 48 Cal. App. 2d 209, 213; Dohrman v. Roof, Inc., 108 Cal. App. 456.
[13]Rose v. Doe, 4 Cal. App. 680, 686.

ever, a question is disallowed and an offer of proof made, then counsel in stating it should keep in mind he is making a professional statement. If, after the formal offer of proof has been made, the court rules that the witness may answer and the witness states he is without knowledge of the fact or gives an inadmissible answer or one entirely at variance with the offer, the examiner is not only embarrassed but may well receive a scathing rebuke by the court.

Shortly stated, offers of proof are almost in the limbo of assignments of error based on a denial of a new trial. Despite the fact that our statutes for 39 years have prohibited our appellate courts from considering or reversing rulings denying new trials,[14] more than 50% of the profession continue to assign such an alleged error in their appeals. Some day the profession as a whole will awaken to the fact that the procedure is entirely useless, and likewise to the fact that an offer of proof will not fare much better. Judges can help speed our trials by pointing out the uselessness of offers of proof.

[14]C.C.P. §963 (Stats. 1915, p. 209); Gray v. Cotton, 174 Cal. 256.

The A.B.A. House of Delegates Met in Boston

By William P. Gray*

William P. Gray

Once again,** by direction of President Gilbert, it is my pleasure, as the representative of the Los Angeles Bar Association in the House of Delegates of the American Bar Association, to report to our members concerning the meeting of the House in Boston last August. Of the seventy-odd matters considered during the five day session, the six items discussed briefly in this article have been selected in the belief that they involve matters of particular importance to all of us. If any member of our Association desires either to receive or to bestow enlightenment concerning any additional aspect of the work of the A.B.A., I would consider it a most gratifying part of my job to confer with him individually.

Individual Rights as Affected by National Security. The special committee bearing the name of this heading submitted a report calling attention to the disturbing fact that in these days when public feeling against alleged underworld characters and subversives runs so high, many of our otherwise responsible citizens are apparently forgetful, or perhaps unaware, that one of the great responsibilities of the Bar is to preserve our tradition of fair trial by making certain that even the most unpopular defendants are adequately represented. The committee suggested the need for affirmative action by the organized Bar in order to increase public understanding and provide support and encouragement to the lawyers that are responding to this challenge to our profession. Accordingly, the House passed unanimously the following resolution:

> 1. . . . the American Bar Association recognizes that the right of defendants to the benefit of assistance of counsel and the duty of the Bar to provide such aid even to the most unpop-

*Member of the Los Angeles law firm of *Gray, Binkley & Pfaelzer;* Secretary and member of Board of Trustees of the Los Angeles Bar Association; Member, House of Delegates of the American Bar Association.

**A report concerning the mid-year meeting appeared in the May issue of the Bar Bulletin, page 277.

ular defendants involves public acceptance of the correlative right of a lawyer to represent and defend, in accordance with the standards of the Bar, any client without being penalized by having imputed to him his client's reputation, views or character.

"2. . . . the Association will support any lawyer against criticism or attack in connection with such representation, when, in its judgment, he has behaved in accordance with the standards of the Bar.

"3. . . . the Association will strive to educate the profession and the public on the rights and duties of a lawyer in representing any client, regardless of the unpopularity of either the client or his cause.

"4. . . . the Association requests all state and local associations to cooperate fully in these directions."

The above named committee also discussed the recent occasional attempts to suppress books primarily because of the views of their authors, some of which did not appear in the books. The report recognized the right of the Government, as a matter of practical administration of an overseas library program, to restrict those libraries to books that it deems to contain accurate and effective portrayals of American life and culture. But, the committee continued, here at home, the spirit of the great constitutional guarantee of a free press implies the principle that ". . . our people should not be denied the right to read anything, not obscene or otherwise illegal, which may be published. This is because we, like our forefathers, believe that truth can be counted on to prevail in a free competition of ideas. Any fear that our people have become so soft-headed that they must now be protected against an opportunity to examine the books of authors whose personal views or conduct are obnoxious is unfounded. . . . A learned profession like ours is peculiarly aware that books contain the core of the great traditions of our history and civilization. No one should be allowed to tamper with them without sharp reaction from the Bar." The committee thereupon asked the House to reaffirm these principles in the following resolution:

"*Resolved,* That the freedom to read is a corollary of the constitutional guarantee of freedom of the press and American lawyers should oppose efforts to restrict it."

The affirmative vote of the House was unanimous.

Individual Rights as Affected by Congressional Investigations. The above-mentioned special committee on individual rights was authorized by the House to "* * * make a study of procedures for

(Continued on page 122)

Brothers-In-Law

And What They Are Doing in OTHER BAR ASSOCIATIONS

By George Harnagel, Jr.

George Harnagel, Jr.

The Honorable Bolitha J. Laws, Chief Judge of the United States District Court for the **District of Columbia,** has taught a Bible Class at the Mt. Vernon Place Methodist Church, Washington, D. C., for more than twenty-one years. Each year his class designates one Sunday as Lawyers' Day and extends a special invitation to all members of the bench and bar in the District to attend on that particular day.

* * *

The **Detroit** Bar Association has an Advisory Fee Committee which, in addition to maintaining a more or less continuous evaluation of the Association's minimum fee schedule, has the responsibility of mediating fee disputes.

* * *

Our award for the most reassuring (and refreshing) Committee Report of the month goes to the Committee on Jurisprudence and Law Reform of the Hennepin County **(Minneapolis)** Bar Association for the following deliverance:

> Immediately upon the appointment of the membership of the above committee the Chairman contacted by letter all of the members of the Committee, inquiring as to whether there were any matters which any of the members desired to have the committee consider, and further advised that he would not call a meeting of the committee unless there was such business, or unless, from any other source during the year any matters of business would be referred to the committee.
>
> There have been no matters for presentation to the Committee, and the Committee has not met during the year.

* * *

"The lawyer's greatest weapon is clarity, and its whetstone is succinctness."—E. Barrett Prettyman, United States Circuit Judge for the District of Columbia Circuit.

The Ohio Bar Title Insurance Company has been organized by the **Ohio** State Bar Association Foundation for the purpose of insuring titles to real property in Ohio.

The Foundation will own all of the common stock and preferred shares are being sold only to members of the legal profession.

The company is patterned after the Lawyers' Title Guaranty Fund of **Florida**, which was organized by the bar of that state five years ago. It will issue title insurance policies through offices of participating lawyers to clients for whom they have made title examinations.

* * *

The senior law students in the law schools in **Minnesota** may become associate members of the State Bar Association by the payment of a nominal amount.

The Association's Committee on Student Associate Members recently presented a clinic for these students on "How to Establish and Manage a Law Practice."

* * *

Because of "the unavailability of adequate facilities in the cities of Louisiana," the 1954 convention of its State Bar Association will be held at **Biloxi**, Mississippi, on the Gulf Coast.

* * *

Go East young lawyer? Recent issues of *The Ohio Bar* have contained an unusual number of help wanted advertisements by law firms in the Buckeye state.

* * *

Dicta, monthly journal of the **Denver** Bar Association, brings us the following convincing evidence that there *is* something new under the sun:

HEIRS FOUND, ESTATE MISSING!

In 1948 a Denver attorney wrote to one John McConville of Lurgan, County Armagh, Northern Ireland, in an effort to locate the heirs of another John McConville who died in 1880 possessed of mining claims at Leadville, Colorado. Heirs of the late Mr. McConville have now been located but the name of the Denver lawyer who was seeking them is not known and the estate cannot be located. Any lawyer having information concerning this matter is urged to contact Aneurin Rees and Davies, Solicitors, 60 Castle Street, Liverpool, England.

* * *

IRREVOCABLE TRUSTS FOR CHILDREN OF TRUSTOR

By Joseph Rose*

(Continued from December 1953 issue)

FEDERAL ESTATE TAXES

I. *Power to Alter Beneficial Interests*

It is clear that a power, in existence immediately prior to trustor's death, to change the interests of the trust beneficiaries, either as to income or principal, is sufficient, without more, to render the trust taxable on trustor's death.[6] This applies, of course, where the trust estate is to go as provided in trustor's will.

A power reserved to the trustor (individually or as trustee) to invade principal for a beneficiary is risky, even though governed by an external standard, i.e., contingent on an event beyond the trustor's control.[7]

A power in the trustor (individually or as trustee) to terminate the trust and vest all title forthwith in the beneficiaries is sufficient to make the trust estate taxable.[8]

The requirement of consent of an adverse interest does not eliminate the tax.[9]

In case of crossed trusts, wherein each trustor gives to the other a power to amend or revoke, the government may succeed in taxing in each trustor's estate the assets in the other's trust.[10]

II. *Administrative Powers Retained by Trustor*

If the grantor is trustee the trust powers must not be sufficiently broad to amount, directly or indirectly, to a power to change or alter beneficial interests under the trust. In *Comm. vs. Hager,* 173 Fed. 2d 613, the trustor-trustee had power to determine whether capital gains realized on sale should go to income or principal and whether income should be paid out or added to principal. It was held that the result of this was to reserve to the trustor power to change the respective rights of life tenants or remaindermen, and that the entire trust corpus was includible in trustor's estate for tax pur-

---

For a brief biography of Mr. Rose see Vol. 29, No. 3, LOS ANGELES BAR BULLETIN, page 17, December 1953.

[6]Reg. 105 Sec. 81.20.

[7]*Lober v. U. S.*, ... U. S. ..... (11-9-53).

[8]*Loughridge v. Com.*, 183 Fed. 2d 294; *Lober v. U.S.*, 108 Fed. Supp. 731; but cf. *Hays v. Com.*, 181 Fed. 2d 169 (Cert. granted); Nossaman, Trust Administration & Taxation, Sec. 663.

[9]Nossaman, Trust Administration and Taxation, Sec. 663.

[10]*Lehman v. Com.*, 109 Fed. 2d 99; cf. *Newberry v. Com.*, 201 Fed. 2d 874.

poses. (See also *Industrial Trust Co.* case Note 20, *infra.*) The provision would, of course, have had no such effect if the trustee had been a corporation.

Similarly, great care must be taken in reserving powers to the trustor to control and manage the trust estate (even though the powers arise by virtue of his office as trustee or consultant). For example, a power to substitute any securities for those of the trust will probably render the trust estate taxable on death of the trustor who reserves such power,[11] as will a power to borrow without adequate security. On the other hand, a power to substitute securities of equal value, to vote corporate stock (even though it be stock of the trustor's own closely held corporation) and to perform or control other administrative acts, including investing, which cannot operate to alter the rights or interests of beneficiaries will not result in taxation. The test is: are the powers of management a device to obtain for the trustor economic benefits in the trust estate.[12]

It has been held that a power to amend the trust, but without

[11] *Commonwealth Trust Co. v. Driscoll*, 137 Fed. 2d 653.
[12] Nossaman, Trust Administration & Taxation, Sec. 666.

(Continued on page 125)

Silver Memories

Compiled from the World Almanac and the L. A. Daily Journal of September and October 1928, by A. Stevens Halsted, Jr.

A Stevens Halsted, Jr.

The U. S. Supreme Court has under submission the question of whether clubs are liable for damages to wives for depriving them of the companionship of their husbands as well as a part of their spouse's income. The case arose in Nevada in a suit against the McGill Club where a wife asserted her husband spent much of his time playing poker, lost a large part of his salary, all of which caused her "worry, humiliation, sickness and grievous mental pain."

On its first commercial trip the dirigible *Graf Zeppelin,* commanded by **Hugo Eckener** and with 20 passengers and a crew of 40, left Friedericksbaven, Germany, and flew to the Naval Air Station at Lakehurst, New Jersey, after 111 hours and 38 minutes in flight and having traveled 6,300 miles. On her return trip, in which a golf caddy from St. Louis stowed away, the balloon traveled 4,000 miles in 69 hours.

* * *

Captain **C. B. D. Collyer** and **Harry Tucker** hopped off at Roosevelt Field, New York and landed in Los Angeles, 25 hours in the air, a record non-stop trip across the continent. They were killed on the return trip.

* * *

As a demonstration of affection for Premier Mussolini and a desire to aid the economic well-being of Italy by reducing the public debt, the common people offered up gilt-edged national securities worth $7,000,000 to be publicly burned in Rome.

Prince George (Lieut. "George Windsor") arrived in Santa Barbara from the British warship Durban. Upon landing, he received a cable from King George telling him not to do any flying. A Hollywood film star had invited the Prince to fly with her, but he declined.

* * *

Harry J. Bauer, Los Angeles attorney, has given $100,000 for the endowment of the U.S.C. Law School. Mr. Bauer is an alumnus of the University, Class of 1909.

* * *

At a Paris meeting of Premier **Poincare,** who is also the French Finance Minister, **Winston Churchill,** the British Chancellor of the Exchequer, and **S. Parker Gilbert,** Agent General for Reparations Payments, it has been decided to turn over to a world committee of bankers and economists the task of fixing the total of Germany's reparation debts to the Allies.

* * *

"PAYMENT IN FULL"—OR IS IT?

(Continued from page 100)

What is an "honest dispute"? The dispute does not need to be well-founded, but it must be grounded in good faith.[9] One suggested test: is the dispute honest or is it fraudulent?[10] An arbitrary refusal to pay is not sufficient; to attempt to create a dispute by a mere naked refusal to pay the whole sum "would be extortion and not compromise."[11] A few examples will illustrate the point:

A mere attempt to avoid paying the contract price will not create a bona fide dispute. A real estate broker earned a commission of $1400.00 when he found a buyer for a tract of land. Seller told the broker he would pay him only $500.00. The broker claimed his full commission. Seller stated, "I will not pay it unless you sue me," and later sent a check to the broker for $500.00, with a letter stating that the check was "your commission . . . as agreed upon at time of sale . . ." Broker cashed the check, demanded an additional $900.00, and sued for that sum. Commenting somewhat acidly on the defendant's attempt to avoid his legal obligations, the court found no real dispute existed, and gave judgment for plaintiff.[12]

Righteous indigation is no substitute for a bona fide dispute. A good-faith controversy was not created when a debtor, outraged at his creditor's statement, sent him a smaller sum with the comment, "I consider [the charges] altogether too high and I certainly shall not pay this price unless a jury and judge say that I shall pay the same."[13] Nor will bullheadedness alone create a dispute to support an accord. So a debtor may not avoid paying the contract price by tendering a smaller sum with an ultimatum, "I am not going to pay anything more," for the refusal to pay the full claim is "unreasonable and arbitrary."[14] Receipt without protest by the debtor of the creditor's monthly statements may create an account stated; acceptance thereafter of a smaller sum would rarely be grounded upon a good-faith dispute so as to create an accord and satisfaction.

---

[9]*Everhardy v. Union Finance Co.*, 115 CA 460, 1 P.(2d) 1024 (1931).

[10]*B & W Engineering Co. v. Beam*, 23 CA 164, 137 P.624 (1913).

[11]*Berger v. Lane, supra*, note 8, quoting with approval from *Demars v. Musser-Sauntry, etc., Co.*, 37 Minn. 418, 35 N.W. 1.

[12]*Berger v. Lane, supra*, note 8, where the court stated (190 Cal. 448): "An arbitrary refusal to pay, based on the mere pretense of the debtor, made for the obvious purpose of exacting terms which are inequitable and oppressive, is not such a dispute as will satisfy the requirements of the rule."

[13]*Weller v. Stevens*, 12 CA 779, 108 P.532 (1910).

[14]*Wild v. United X-Ray & Eqpt., Inc.*, (L.A. Mun. Ct., No. 1,068,477, April 2, 1952), Vol. 3, No. 5, *Daily Journal Reports*, where the creditor cashed a check bearing the notation, "Endorsement herein is acceptance in full for all wages, salaries, or monies of any nature whatsoever to date."

It is not always necessary that the amount of the claim be in dispute; a good-faith dispute over the debtor's *liability* may support an accord and satisfaction. Where there is a substantial question that the alleged debtor is liable at all under a contract, or a serious issue is raised concerning the extent of his liability, a smaller sum tendered and accepted in "full payment" will extinguish the entire liability.[15]

Mistake or Fraud Prevents Making of an Accord

Like other contracts, an accord and satisfaction may be set aside for fraud or mistake. So where plaintiff cut and hauled logs from defendant's timber land at an agreed price per board foot, received and cashed checks "in full receipt" for amounts due him, and later found that defendant's measurements of the timber were incorrect, the mistake prevented extinguishment of the full indebtedness.[16] Similarly, where the lessor was entitled to one-eighth of the proceeds of gas found on his premises, received statements from the lessee showing monthly proceeds which were accompanied by checks "in full settlement" for lessor's share, and cashed the checks, no accord and satisfaction was effected when he later discovered that lessor's statements were false.[17]

The effect of fraud, mistake, or error is sometimes said to prevent a "meeting of the minds,"[18] or to "impeach" or "open" an accord.[19] It could as logically be found that when one party is mistaken or has been duped, there is no bona fide dispute to support an accord and satisfaction.[20]

Payment of Conceded Portion as Satisfaction of Disputed Portion

Assume A sells to B one hundred crates of cantaloupes at $8 per crate. A admits that he owes B $400 for fifty crates, but claims that most of the cantaloupes in the remaining crates were spoiled and he owes nothing for them. B denies that any were spoiled and demands the full contract price of $800. A sends B a check for $400 in "full payment," and B cashes the check under protest. Does such payment of a conceded portion of a larger claim effect an accord and satisfaction of the disputed portion?

This question, although presenting some difficulty in the past,

---

[15] *Grayhill Drilling Co. v. The Superior Oil Co.*, 39 Cal. (2d) 751 (1952), 249 P.(2d) 751. (Question of whether an oral modification of a written contract was valid.)
[16] *Kinkle v. Fruit Growers Supply Co., supra*, note 5.
[17] *Whepley Oil Co. v. Associated Oil Co., supra*, note 2.
[18] *Ibid.*
[19] *Kinkle v. Fruit Growers Supply Co., supra*, note 5.
[20] *Cf. Rued v. Cooper*, 119 Cal. 463, 34 P.98 (1897).

has recently been answered in the affirmative by the California Supreme Court; and our state now follows the "majority rule" that payment of a conceded part of a claim may operate to extinguish the whole claim.[21] Earlier decisions held that an accord is not effected under such circumstances because, without a dispute as to the conceded portion of the claim, there is no consideration to support an accord.[22]

There can hardly be found any detriment or consideration in payment or acceptance of what is admitted to be due; the refusal of a creditor to pay more would seem to be "arbitrary" so as not to create a "bona fide dispute." It has been suggested, however, that the courts frequently skirt around the requirement of finding consideration in this situation because the creditor is benefited by receiving payment of the conceded portion without having to sue upon the whole claim.[23] In any event, except perhaps where an employee-employer[24] or agent-principal relationship exists, the fact that the debtor offers payment of only the conceded portion of a claim will not prevent the making of an accord and satisfaction as to the disputed balance.

When an agent tenders "full payment" of monies—such as collections—due his principal, the courts have been reluctant to find an accord where only a conceded portion has been paid. In this situation, we are told, the principal is not required to return his own money to the agent under penalty of acknowledging he is entitled to no more.[25] Earlier decisions gave no special treatment to agents and principals.[26] It is still not clear how far the courts will go in protecting the principal or agent under such circumstances.

Explicit Statement Showing Settlement

A man must be given fair warning if he is to lose his claim by

[21] *Potter v. Pacific Coast Lumber Co., supra,* note 4, where the court suggests that the whole claim is "integrated." See also *Annotation,* 112 *A.L.R.* 1219, and *Robertson v. Robertson, supra,* note 3.

[22] *Sharp v. Conti,* 57 CA (2d) 1007, 136 P.(2d) 99 (1943); *Skidmore v. County of Alameda,* 13 Cal.(2d) 534, 90 P.(2d) 577 (1939); *Ferryboatmen's Union v. Northwestern Pac. R. R. Co.,* (C.C.A. 9, 1936) 84 F.(2d) 773 (1936).

[23] *Annotation,* 112 *A.L.R.* 1219, 1221.

[24] *California Labor Code,* Section 206, enjoins the employer, "in case of a dispute over wages," to pay "without condition . . . all wages . . . conceded by him to be due, leaving the employee all remedies he might otherwise be entitled to as to any balance claimed."

[25] *Swerdfeger v. United Acceptance Corp.,* 9 CA(2d) 590, 50 P.(2d) 818 (1935), where the agent-principal relationship was said to require a different rule than where the parties are simply debtor and creditor; *Egan v. Crowther,* 74 CA 674, 241 P.90 (1925), where the court could find no consideration to support an accord in the agent's "promise to perform" or "performance of a duty." See also *D. E. Sanford Co. v. Cory Glass, etc., Co.,* 85 CA (2d) 724, 194 P.(2d) 127 (1948), in which no accord was made out by the principal's sending checks to the agent for commissions conceded to be due.

[26] *California, etc., Ass'n. v. Rindge L & N Co.,* 199 Cal. 168, 248 P.658 (1926). See also *Johnston v. Burnett,* 17 CA 497, 120 P.436 (1911), where an accord was effected by an attorney's transmitting collections by check to the client, after deducting attorney's fees and expenses.

taking part payment. Therefore, an accord will be found only when the language accompanying payment "unequivocally" and "explicitly" shows that the tender is made in full satisfaction of the debt.[27] Such language may be written on the check, or in an accompanying letter, or may even be in the form of oral declarations.[28]

The preciseness of a Blackstone is not necessary to satisfy the rule. Any language which flashes a clear red light to the creditor is sufficient. Commonly found to meet this test are such commercial cliches as "in full payment to date," "in full settlement," and the more-expansive "in full and final settlement of all claims."[29]

Words which have been considered too "ambiguous" to foreclose the creditor from collecting his balance include: "according to our books, the above balances all our account," "final payment" on an installment contract, and [enclosed] "your commission . . . as agreed upon."[30] Merely sending a check to the creditor, accompanied by a statement in the same amount, does not convey the requisite degree of finality to establish an accord.[31]

Intention to Receive Payment as Full Satisfaction

We have referred above to the difficulty of finding mutual assent to support an accord when the creditor denies that he is accepting the amount tendered as full satisfaction. Yet judicial sanction is generally given to the orthodox rule of contracts, that no accord results unless the circumstances disclose the parties' mutual agreement to consider partial payment as full satisfaction.[32] Many times such agreement is found in the tender and acceptance of part payment, although the creditor claims at the time a right to the balance. Sometimes, however, such "circumstances" allow a creditor to accept part payment today and sue tomorrow for the balance.

Sometimes conduct or declarations at the time of the tender disclose an intention that the parties are not settling everything. So when A accepted a check from his co-partner B "in full settlement of all claims," but in a conference B admitted that there was

---

[27]See *Weller v. Stevens, supra,* note 13; *Messer v. Tait's, Inc.,* 121 CA 698, 9 P.(2d) 536 (1932).

[28]*Berger v. Lane, supra,* note 8; *Biaggi v. Sawyer,* 75 CA (2d) 105, 170 P.(2d) 678 (1946), where no accord was effected when the debtor typed words on the check importing full payment after it was cashed.

[29]*B & W Engineering Co. v. Beam, supra,* note 10; *Grayhill Drilling Co. v. The Superior Oil Co., supra,* note 15; *Potter v. Pacific Coast Lumber Co., supra,* note 4.

[30]*Messer v. Tait's Inc., supra,* note 27; *Lapp-Gifford Co. v. Muscoy Water Co.,* 166 Cal. 25, 134 P. 989 (1913); *Berger v. Lane, supra,* note 8.

[31]*Work v. Associated Almond Growers,* 102 CA 232, 282 P. 965 (1929); *Meyer v. Cowell Lime, etc. Co.,* 21 CA 602, 132 P. 611 (1913).

[32]*Wallace v. Crawford, supra,* note 5, and cases there cited.

other partnership cattle in which A had an interest, it was held that there was no accord and satisfaction.[33] When a debtor, in a letter accompanying a check in "full settlement," said that he had no personal knowledge of the transaction but relied upon books which seemed correct, there was found no intent to settle in full.[34] A provision in a contract, that disputes are to be arbitrated, tends to prevent the making of an accord, although the creditor accepts "full payment" of monies due under the contract.[35]

Conciliatory conduct by a debtor, after making "full payment," has returned to haunt him when his creditor sues for a claimed balance. Thus, when he met with his creditor to talk "settlement" after paying part of a bill and denying liability for the rest, a debtor learned that his conduct was too equivocal to effect an accord.[36] A debtor's statement, after sending a check in "full settlement," that the account was "squared" but he would "further consider the matter should you disagree," gave to his creditor new life and a successful suit for the balance.[37] Failure by the debtor to make it crystal clear that the sum is tendered in full payment, is a circumstance from which it is usually inferred that there is no intention to settle everything.[38]

The unwary creditor may by his conduct show an intention to accept partial payment in full satisfaction, although the debtor has not expressed himself in explicit terms. For example, a payee returned an unsigned check with a request that the drawer put his name to it, and the check was then accepted without protest; it was held that an accord and satisfaction had been made, although there were no words written on the check disclosing an intention to settle up.[39] Similarly, a woman subscribed for 400 shares of stock but defendant's sales agent absconded with the money she paid him. The lady demanded that the corporation issue her 400 stock shares, but expressed her satisfaction upon receipt of only 300 shares. These facts disclosed an intention that plaintiff had accepted the tendered stock shares in full satisfaction.[40]

---

[33]*Owens v. Noble*, 77 CA (2d) 209, 175 P.(2d) 241 (1941); See also *Work v. Associated Almond Growers, supra*, note 31.

[34]*Duncan v. F. A. Hihn Co.*, 27 CA 152, 148 P. 971 (1915). There was also lacking here an "unequivocal" statement that the tender was in full payment.

[35]*Sierra and S. F. Power Co. v. Universal Electric & Gas Co.*, 197 Cal. 376, 241 P 76 (1925); *Whepley Oil Co. v. Associated Oil Co., supra*, note 2.

[36]*Weller v. Stevens, supra*, note 13.

[37]*Duncan v. F. A. Hihn Co., supra*, note 34.

[38]See cases cited at notes 27-31, inclusive, *supra*.

[39]*Creighton v. Gregory, supra*, note 3.

[40]*Everhardy v. Union Finance Co., supra*, note 9, where the court found a "bona fide dispute," although defendant may not have had a legal right to refuse issuance of the rest of the stock to plaintiff.

Thus, conduct and declarations accompanying or following tender of partial payment, may strip the debtor of the settlement he is seeking; or may crystallize equivocal action into an accord and satisfaction the creditor does not want. In interpreting "surrounding circumstances," the reward often goes to the one who displays firmness and consistency, rather than equivocation and compromise.

Acceptance of Payment by Creditor

One who disputes the correctness of the amount tendered in full satisfaction does not, of course, have to accept payment or cash the check. Unless he does so, there is no accord and satisfaction. The cashing of a check offered in full payment is said to be "very persuasive evidence" of acceptance, but it is not "conclusive."[41] Striking out or erasing words on a check importing full payment apparently has no effect unless the debtor assents.[42]

Retention of a check tendered in full payment for an "unreasonable period" without cashing it, may constitute an implied acceptance.[43] How much delay will effect such a result probably depends upon all the circumstances. If the creditor is unwilling to accept the tender in full satisfaction, he should firmly and quickly inform the debtor to that effect.

Pleading Payment in Full

The debtor must affirmatively plead an accord and satisfaction if he desires to raise that defense to the creditor's suit for an alleged balance. Facts showing payment and acceptance of a certain sum in full satisfaction of the plaintiff's claim will ordinarily be sufficient,[44] but the defense of accord and satisfaction will fail if it is pleaded too broadly.[45] A general denial puts in issue only the allegations of the complaint; it will not permit the debtor to introduce evidence of an accord and satisfaction unless the creditor fails, or waives his right, to object.[46]

When, however, as part of his case, the plaintiff presents evidence that he received partial payment under circumstances tending to show an accord and satisfaction, the defendant may rely upon such facts to make out an accord and satisfaction although that

[41] *Kinkle v. Fruit Growers Supply Co., supra,* note 5.
[42] See *Robertson v. Robertson, supra,* note 3; *Annotation,* 75 *A.L.R.* 905, 918-919. By instructing his bank not to cash the check if such words have been stricken or erased, the debtor may preclude any claim that he has assented to such action by the creditor.
[43] *Mathews v. Pacific Mutual Life Insurance Co.,* 47 CA (2d) 424, 118 P.(2d) 10 (1941). See also *Western Pacific Land Co. v. Wilson,* 19 CA 338, 125 P. 1076 (1912), and *Annotation,* 13 *A.L.R.* (2d) 736.
[44] *Clark v. Child,* 66 Cal. 87, 4 P. 1058 (1884).
[45] *Kelly v. David D. Bohannon Organization, supra,* note 8.
[46] *Coles v. Soulsby,* 21 Cal. 47 (1862); *Reed v. Cornell,* 54 CA 179 201 P. 68 (1921).

defense was not pleaded.[47] Or if on its face the complaint states facts showing an accord and satisfaction, there is no need for the defendant to plead that special defense.[48]

CONCLUSION

Assuming competent parties and no mistake or fraud, one who receives a check in an amount less than the sum he claims will lose his right to the balance, provided (1) a bona fide dispute exists as to the amount due or the debtor's liability, (2) the check is given upon explicit condition that it is in full satisfaction, (3) these and other circumstances disclose an express or implied "agreement" to settle all claims, and (4) he cashes the check, or retains it for an unreasonable time. If all these elements are present, there is an accord and satisfaction despite the creditor's denial that he is settling everything. If any of these requisites is lacking, the creditor can cash the check without losing his right to the balance, but he should first inform the debtor in no uncertain terms that he does not accept the tender as full satisfaction.

It is apparent that whether an accord and satisfaction has been created depends almost entirely on factual matters. A study of the case decisions suggests that frequently finders of fact are somewhat impressed, in interpreting the facts, by the respective equities of the parties. For these reasons it is easier to state the rules than to apply them correctly to all situations. Ordinarily an unsatisfied creditor assumes a certain risk by cashing a check tendered in full satisfaction. But his risk will be reduced by close attention to the particular facts and the applicable principles. The creditor then, despite the bard, need not always "take the Cash and let the Credit go."

---

[47] *B &W Engineering Co. v. Beam, supra,* note 10.
[48] *Wallace v. Crawford, supra,* note 5.

THE ABA HOUSE OF DELEGATES MET IN BOSTON

(Continued from page 108)

the conduct of Congressional investigations." One of the outstanding features of the Convention in Boston was the panel discussion of this subject in historic Faneuil Hall. Congressman Hugh Scott, of Pennsylvania, and Senator Estes Kefauver, of Tennessee, were members of the panel; both spoke of the improvements already made in the practices and procedures of some Congressional committees; frankly acknowledged that there is little uniformity and much room for further improvement; and expressly welcomed the proposed investigation by the A.B.A. The committee, headed by Whitney North Seymour, of New York City, is composed of able and forthright men, and its report to the House next March in Atlanta will be awaited with great interest.

The "Bricker Amendment." This was the only really controversial matter that occupied the attention of the House. The currently proposed text of an Amendment to the U. S. Constitution was advocated last spring by a majority report of the Senate Judiciary Committee, as follows:

> "Section 1. A provision of a treaty which conflicts with this Constitution shall not be of any force or effect.
>
> "Section 2. A treaty shall become effective as internal law in the United States only through legislation which would be valid in the absence of treaty.
>
> "Section 3. Congress shall have power to regulate all executive and other agreements with any foreign power or international organization. All such agreements shall be subject to the limitations imposed upon treaties by this article."

The A.B.A. section on International and Comparative Law urged passage of a resolution that would reverse the previous stand of the House* and oppose the above-quoted Amendment. After vigorous debate, led by Chief Judge John J. Parker, of the U. S. Circuit Court of Appeals for the Fourth Circuit, in opposition to the Amendment, and by Frank Holman, of Seattle, in its favor, the latter prevailed and the resolution was defeated by a vote of 117 to 33.

On this great Constitutional issue, one of the most vital of our times, my position was, and is, with those opposing the "Bricker

---

*See report of 1953 winter meeting, May issue of *Bar Bulletin*, pages 310-313.

Amendment." Increased study has served only to impel more strongly the conclusion that section one is unnecessary because it only states what is, and always has been, the law under the Constitution; and that sections two and three, while they tend to insure against bad treaties and executive agreements, would seriously impair our ability to make good ones.

Social Security for Lawyers. The committee on Unemployment and Social Security recommended that the House reaffirm its previous stand in opposition to legislation that would bring self-employed practicing lawyers within the coverage of the Social Security program. After brief discussion, this recommendation was withdrawn and the committee was requested to report at the mid-year meeting on the desirability of a voluntary plan of social security for professional people.

Disciplinary Procedures. The House approved and adopted a "Statement of principles" as follows:

> "The purpose of discipline of lawyers is the protection of the public, the profession and the administration of justice, and not the punishment of the person disciplined.
>
> "Only persons of integrity and good character should be permitted to practice law.
>
> "Persons admitted to practice law in the state are a part of the judicial system of such state and officers of its courts.
>
> "A license to practice law confers no vested right, but is a conditional privilege revocable for cause.
>
> "The highest court of the state has the inherent power and the duty to prescribe the qualifications that shall be required for admission to practice law, to admit persons to practice law, to prescribe standards of conduct for lawyers, to determine what constitutes grounds for the discipline of lawyers; to discipline, for cause, persons admitted to practice law in such state, and to revoke the license of every lawyer whose unfitness to practice law has been duly established. Such court may not properly delegate the final exercise of such power or duty, or recognize the existence of either elsewhere than in itself.
>
> "It is impossible to determine at the time of the revocation of a license to practice law when, if ever, the person whose license is revoked will become qualified for readmission. Therefore, revocation should not be for a stated period and should place on the person whose license has been revoked and who seeks readmission the burden of establishing by clear and convincing proof that he possesses the qualifications for readmission, which should not be less than those required for original admission.

> "It is the obligation of the organized Bar and the individual lawyer to give unstinted cooperation and assistance to the highest court of the state in discharging its function and duty with respect to discipline and in purging the profession of the unworthy."

Insurance Company Advertising to Prospective Jurors. At the request of Louis E. Wyman, of New Hampshire, the House referred to a special committee the problem implicit in the following resolution that was approved in principle:

> "*Resolved*, That the American Bar Association disapproves advertising by any insurance company or association of insurance companies by which, through pictures or words, any person may be led to believe that, as a juror, he would have a personal financial interest in any verdict he might be called on to render in an action brought to recover damages for personal injuries caused by automobile operation, or that in reaching a verdict in such cases, juries are fixing rates, or that all legitimate and reasonable claims are always settled without a lawsuit."

The American Bar Association can be a tremendous force in the furtherance of the cause of justice in this Country. It seeks and needs the support of all responsible lawyers.

IRREVOCABLE TRUSTS FOR TRUSTOR'S CHILDREN

(Continued from page 112)

power to revoke "nor to change any of the beneficial interests hereunder" was not sufficient to render the trust subject to estate tax on the trustor's death.[13]

III. *Trust to Discharge Trustor's Obligations*

It has been held that the trustor is the owner of a reserved interest in the trust estate, and that it is subject to estate tax on his death, where the income is required to be used to pay his debts, or satisfy his legal obligations.[14] In this connection it should be noted that (as stated under Income Taxes, IV, *supra*) in a tax case the obligation of support may be stretched beyond furnishing mere necessaries.

Where a trust was created to furnish the wife and sister of trustor with independent income and no obligation was placed on them to use the income for their support, and the trustor had the same duty to support the wife after creation of the trust as before, the trust was not created to discharge a legal obligation and was not taxable on trustor's death.[15]

Where trust for minor child (an independent third person being trustee) gives trustee *permission* to use the income to the extent the trustee deems advisable, for the maintenance, education and support of th minor, the corpus is not subject to estate tax.[16] Result would probably be *contra* if trustor were trustee, since trustor would then have held reserved power to accumulate for remaindermen. (See II, *supra.*)

But if the trustee were *required* to use income for support of the child during minority, and if the trustor died during such minority, it seems the trust would be subject to federal estate tax, since the trustor would have reserved benefits for a period which did not in fact end before his death. Result would be the same with an independent trustee.

If a trust with an independent trustee merely provides that all income shall be paid to the minor beneficiary, it seems probable that the trust is not, for this reason, subject to estate tax, even though the income is so paid, since the trustor's obligation of support is

[13] *Neal*, 8 T.C. 237.
[14] *Hooper*, 41 B.T.A. 114.
[15] *Wishard v. U.S.*, 143 Fed. 2d 704. Accord: *Sherman*, 9 T.C. 594 where *trust* gave decedent no right to require that the wife look to the trust rather than to him for support. (See also Reg. 105, Sec. 81.18). Contra: where wife was to receive income for her support and maintenance. (*Com. v. Estate of Dwight;* 205 Fed. 2d 298).
[16] *Com v. Douglass*, 143 Fed. 2d 961.

not necessarily discharged thereby.[17] But result is perhaps otherwise where the parent-trustor is trustee. In any event, if the trust provides that income is to be paid to the minor it should contain a specific declaration that the trust is not established to discharge any of the legal obligations or duties of the trustor as father, and that payments to the child are not intended to be in lieu of or in discharge of any parental obligation, or in any way to benefit the trustor.

It is probably safest, from an estate tax standpoint, to provide that trust income be accumulated during minority.

If the trust may be drawn on by trustor's executor to pay his death taxes, or it seems, other legal obligations, it will be includible in his estate to this extent, for death tax purposes.[18] Same result where trust *requires* trustee to pay death taxes on trustor's estate.

IV. *Effect of Power to Change Trustee*

The trustor will be treated as though he were trustee where he has power to remove the trustee and substitute himself.[19] Also, when the trustor is co-trustee the result may be same as though he were the sole trustee.

V. *Accumulation of Income*

If this is limited to minority of the beneficiary no estate tax difficulties are presented. If it continues beyond minority the same result seems to follow. However, if the trust provides for accumulation but in addition provides the trustee may distribute or apply income for the benefit of the minor after the trustor's death, the result may be to subject the trust to estate tax, if the trustor's death occurs before the beneficiary attains majority. (See discussion in VI, *infra.*)

A discretionary power in the trustor-trustee to accumulate or pay out income is of course equal to a power to determine who shall enjoy the income and renders the trust taxable.[20] See also II, *supra.*

VI. *Possibility of Reverter or Other Interest in Trustor.*

With respect to transfers made after October 7, 1949, the presence or absence of a retained interest in the decedent is immaterial. The trust may be included in the estate of the trustor for estate tax purposes even though no possibility of reverter is retained by him. The Code[21] provides that as to trusts created after such date, the trust estate will be taxed on the ground that it is intended to take effect at or after decedent's death if (A) possession or enjoy-

[17] *Wishard v. U.S.*, 143 Fed. 2d 704.
[18] *Sloane v. Com.*, 168 Fed. 2d 470.
[19] *Loughridge v. Com.*, 183 Fed. 2d 294.
[20] *Industrial Trust Co. v. Com.*, 165 Fed. 2d 142.
[21] Sec. 811(c)(3) I.R.C.

ment can be obtained only by surviving the decedent; or, (B) possession or enjoyment can be obtained only by surviving the earliest to occur of (1) the decedent's death, or (2) some other event, and such other event did not in fact occur prior to decedent's death. Examples illustrative of the foregoing will be found in Reg. 105, Sec. 81.17, as amended.

Where it is desired to eliminate a trust from the trustor's estate for estate tax purposes, it is advisable to avoid any trust provisions that tie in, in any way, to trustor's life or death.

As corollaries to the foregoing:

(a) Don't measure the trust by the trustor's life;

(b) Don't make it impossible for the trust to terminate during the trustor's life,

(c) Don't make enjoyment of any interest conditioned on the trustor's death,

(d) Don't measure by fixed period of years after trustor's death.

On the general subject of the estate tax aspects of inter vivos trusts for minor children, see "Taxes," Sept. 1950, page 825.

GIFT TAXES

If gift taxes are to be reduced insofar as possible, the income should not be accumulated, but should be directed to be paid out currently to the income beneficiary. An accumulation of income creates no present life estate, but a direction to pay it out currently to the life tenant does have this effect, with the result that the value of the gift of income, determined actuarily, is tax-free up to the amount of the $3,000 annual exclusion. This value is then deductible from the value of the trust assets at inception of the trust, and the difference is the value of the future interest which is subject to gift tax (after the donor has exhausted his $30,000 exemption).

What trust provisions may prevent a trust from creating a present life estate, with the result that the $3,000 exclusion will be lost? A few examples are:

(1) There is no present interest where the income is directed to be accumulated, even though the beneficiary receives it on attaining majority, and it goes to his estate if he dies prior thereto.[22]

(2) There is no present interest where the trustee, or a third person directing the trustee, has discretion to pay or not to pay the income to the beneficiary, or discretion to allocate

[22] *Com. v. Disston*, 325 U.S. 442.

it among the beneficiaries,[23] or to pay as much as is deemed necessary for support[24] unless there is an external standard.

(3) A power in the trustee to invade corpus for the beneficiary may well result in loss of the exclusion, on the theory that the beneficiary's income may not continue for any determinable period of years, but may be cut short as a result of the distribution of corpus to him.[25] Similarly, a discretion in the trustee to pay the entire corpus to one other than the income beneficiary results in loss of the $3,000 exclusion.[26]

(4) Infant's power to demand corpus at any time has been held to give the infant a present interest.[27]

(5) Power in the trustee to pay direct to the beneficiary or to pay his guardian or mother, or apply for his benefit, does not result in a future interest or loss of exclusion.[28]

(6) Where corpus of the trust was stock and there was no evidence it would continue to pay dividends, life estate has been held impossible of evaluation.[29]

In general, see also 1952 Major Tax Problems, U.S.C. Tax Institute 203; 1951 Panel Discussion of Current Tax Problems, Title Insurance & Trust Company, P.36.

In passing, note: If the trust is for A for life, remainder to B, there will be an exclusion (within the $3,000 limit) to the extent of the value of A's life estate. However, if the trust provides A is to receive the income for two years and then receives the corpus, or that income is to go to A for life, with a discretion in the trustee to pay him the corpus in two years, the value of A's present interest (and the exclusion) is limited to the value of his right to receive the income for two years. (Text writers have commented on the absurdity of this: Montgomery, Estate, Trusts & Gifts, 1951-2, pg. 1055.)

---

[23] *Helvering v. Blair*, 121 Fed. 2d 945.

[24] *Rassas v. Com.*, 196 Fed. 2d 611.

[25] *Evans v. Com.*, 198 Fed. 2d 435.

[26] *Riter*, 3 T.G. 301.

[27] *Kieckhefer v. Com.*, 189 Fed. 2d 118. Second Circuit has refused to follow this: *Stifel v. Com.*, 197 Fed. 2d 107.

[28] *Sharp v. Com.*, 153 Fed. 2d 163. Accord: Kelly, 19 T.C. 27 — income to be paid to guardian. But cf. *Schumacher*, 8 T.C. 453, where stock was given to father as guardian, the donor showing an intent that the father have control.

[29] *Newmaker*, 12 T.C.M. 232.